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Rights and Obligations of Arbitrators in the Deliberations

BERNHARD BERGER^{*}

1. Introduction

This article addresses the legal framework of the deliberations, i.e. the rights and obligations of arbitrators in the deliberation process. It derives from an introductory presentation held at the ASA Conference of 1 February 2013 devoted to the topic: “Inside the Black Box – How Arbitral Tribunals Operate and Reach their Decisions”.¹

What is a “black box”? In natural science, a “black box” seems to be a term used for a device or system whose inner workings are unknown.² More precisely, it is described as something that can be viewed solely from the outside, in that you only know the input, output and transfer characteristics, but you have no knowledge of its internal workings. In other words, the details on the implementation of the result (the output) remain in the dark (black). The opposite of a black box would thus be a “glass box” or “white box”, i.e. a system whose inner components are available for inspection.

If we apply these criteria to arbitration from the parties’ perspective, the deliberations must in fact appear as some kind of “black box”, given that they only know the totality of all the arguments and motions put forward by them in contradictory proceedings (input), the result of the arbitration in the form of the dispositive part of the arbitral award (output), and the reasons given for the decision in the award (transfer). The parties normally have no access, however, to information about how the members of the arbitral tribunal ultimately arrived at, and agreed on, their decision. In other words, they do not know and cannot (or at least should not) find out about the inherent unspoken motives of an arbitral award. For example, is there perhaps a relatively “mild” decision on quantum as a bargaining chip for a unanimous affirmation of liability?

Over the last one or two decades arbitration has gradually developed into a neatly structured process: from the constitution of the tribunal to the

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¹ See ASA President Michael E. Schneider’s Message on “Arbitral Decision Making – a Look into the Black Box” in ASA Bull. 2012, pp. 509-511.

² See the definition of “black box” in the Wikipedia free encyclopedia (www.wikipedia.org).

terms of reference, the famous set of specific procedural rules and the provisional timetable, the written submissions, document production, the style of the evidentiary hearing, and the streamlined, sometimes even scrutinised arbitral award, just to name a few of these well-explored and largely standardised steps. Some of us might even say that we see a trend towards “preformatted” arbitration.

Despite this trend, the deliberations among the tribunal members have largely remained *terra incognita* where only on rare occasions any defects or other insufficiencies have been reported which then gave rise to a debate on the integrity of the process and the consequences of the failure on the award, whether at the stage of setting-aside or enforcement.³

This notion of *terra incognita* includes that we know little about how arbitral tribunals in fact organise themselves in the deliberations. This may have several reasons. One certainly is that every arbitral tribunal is unique in the sense that it is not a standing body like a state court but rather an ad hoc panel chosen by the parties to decide “their” dispute, with the result that its members cannot normally rely on any pre-existing experience with each other and therefore have to agree on how to proceed in the first place. Another reason is that the stage of the deliberations is the first (and final) step in the arbitration where there is no longer any interaction between the parties and the tribunal. The parties are not allowed to attend the deliberations, let alone to participate in them. Unlike in some state courts, the deliberations of an arbitral tribunal are (almost universally) considered as something that takes place *in camera* – the confidentiality of the deliberations is seen as an inherent feature of international commercial arbitration.⁴ When there is no longer any interaction between the parties and the tribunal, like in the deliberations, there is no longer any need for a well-structured and transparent process, it seems.

In view of these considerations, it does not come as a surprise that, for example, the UNCITRAL Notes on Organizing Arbitral Proceedings of 1996 are totally silent on the topic of deliberations and votes, while all other steps of the arbitration in which there is interaction between the parties and the

³ On insights into the secret – and sometimes opaque – specificities of international arbitration, see in general: Draetta, *Behind the Scenes in International Arbitration*, 2011, *passim*.

⁴ Born, *International Commercial Arbitration*, 2009, Vol. I, p. 1632; Vol. II, pp. 1869, 2269; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 2010, N 1344; Fouchard, Gaillard and Goldman, *International Commercial Arbitration*, 1999, N 1374; Girsberger and Voser, *International Arbitration in Switzerland*, 2012, N 615, N 980; Lalive, Poudret and Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, Art. 189 N 11; Poudret and Besson, *Comparative Law of International Arbitration*, 2007, N 734a; Wirth, *Basler Kommentar*, 2006, Art. 189 IPRG N 25.

tribunal are dealt with in detail. Does that mean that the drafters of the Notes were of the opinion that the deliberations and votes are something that is not part of the “arbitral proceedings” or did they consider that this is something that does not need to be “organised”?

2. The legal source of the deliberations

In multi-member arbitral tribunals the need for deliberations – defined as a joint effort by the arbitrators to identify the relevant issues and then proceed to an active exchange of arguments, ideas, reflections and a weighing of options on those issues⁵ – is described by most legal commentators both as a matter of course and as a legal requirement.⁶ But why is that?

We should not forget that, for example, in the Swiss Federal Tribunal about 80% of the cases in civil and commercial matters are decided with no “real” deliberations taking place at all, meaning that the draft judgment prepared by the instructing judge is approved and adopted by his/her fellow judges without further comment.

I am therefore inclined to make the following case: If no judge or no arbitrator so requests, there is no need, let alone a legal requirement for a separate (and purely artificial) round of deliberation, with the result that the relevant judgment or award is neither subject to annulment nor non-recognition.

But why then are the deliberations seen as such an essential, indispensable feature of arbitration? In my opinion, the answer is not mysterious but rather simple: in multi-member arbitral tribunals the need for deliberations arises in almost all cases from the fact that such a tribunal is – besides the chairperson – composed of two party-appointed arbitrators and these two judges – although they shall be impartial and independent – are expected by their nominating parties to ensure that their (contrary) cases will find support and justice to the best extent possible.

Notwithstanding the apparent need for deliberations in arbitration it is striking that this aspect of the decision-making process is rarely addressed by national arbitration laws, let alone comprehensively dealt with. Articles

⁵ For other attempts to define the notion of “deliberations” see, e.g. Bredin, *Retour au délibéré arbitral*, *Mél. Reymond*, 2004, pp. 45-46; Derains, *La pratique du délibéré arbitral*, *Liber Amicorum Briner*, 2005, p. 223; Mestre, *Quelques réflexions sur la pratique du délibéré arbitral*, *Rev. arb.* 2012, pp. 782-784.

⁶ Poudret and Besson (fn. 4), N 733.

1476(2) and 1479 of the French NCPC mention the deliberations but do not address any of its particulars. In many arbitration laws (like the Swiss Private International Law Act) the term “deliberations” does not even appear. Instead, these laws simply deal with the decision-making by a panel of arbitrators – like Article 29 of the UNCITRAL Model Law:

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.”

Similarly, many of the leading international arbitration rules lack any specific provisions on the deliberations and limit themselves to deal with the issue of majorities to be reached between the arbitrators when a decision has to be reached – like Article 33(1) of the UNCITRAL Arbitration Rules ...

“[w]hen there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.”

... and somewhat more progressively as stated in Article 31(1) of the Swiss Rules and Article 31(1) of the ICC Rules which both add to the previously stated rule that ...

“[i]f there is no majority, the award shall be made by the president of the arbitral tribunal alone.”

The legal source of the deliberations therefore remains to a large extent a mystery – or just a “black box”. Some authors – like the majority in France – say that the requirement for deliberations must be seen as based on international public policy.⁷ Other authors – among them distinguished Swiss arbitration practitioners – consider that the parties have a right to deliberations arising from their right to be heard in adversarial proceedings as specified, for example, in Article 182(3) of the Private International Law Act.⁸

⁷ See, e.g. Bredin (fn. 5), p. 45; Leboulanger, *Principe de collégialité et délibéré arbitral*, Mél. Knoepfler, 2005, p. 266; Derains and Schwartz, *A Guide to the ICC Rules of Arbitration*, 2005, p. 307; Fouchard, Gaillard and Goldman (fn. 4), N 1369. For Switzerland, see: Poudret and Besson (fn. 4), N 733; Wirth, *Basler Kommentar*, 2006, Art. 189 IPRG N 10.

⁸ Bucher, *Commentaire Romand*, 2012, Art. 189 LDIP N 3; Girsberger and Voser (fn. 4), N 978, N 994; Kaufmann-Kohler and Rigozzi, *Arbitrage international, Droit et pratique à la lumière de la LDIP*, 2010, N 675. The Swiss Federal Tribunal seems undecided on this matter, referring at the same time to both “a right of the parties” and “an unwritten rule of international public policy applicable to international arbitration in general”; see BGER 4P.115/2003 of 16 October 2003 E. 3.2.

In my opinion, both of these explanations are not entirely satisfactory.

Once the proceedings have been declared closed and the procedure for the making of the award has commenced, the parties no longer enjoy the right to be heard in adversarial proceedings. As mentioned, there is no interaction anymore between the parties and the arbitral tribunal at this stage of the proceedings. Therefore, I am not convinced that the parties may invoke a “right to deliberations” against the arbitrators – at least not an enforceable one. It is inconceivable in my opinion that the parties (or each party individually) may have a claim for “specific performance” in this regard, with the result that there is also no enforceable “duty to deliberate” that can be imposed on the arbitrators.

On the other hand, it appears as a shortcut to simply state that deliberations are a matter of international public policy. Public policy is not a self-sufficient term. As the Swiss Federal Tribunal – to take an example – has explained on many occasions, public policy as a ground for annulment or non-enforcement of an arbitral award needs to be substantiated by specific fundamental legal principles such as *pacta sunt servanda*, the prohibition of abusive use of rights, the principle of good faith and the like. In my opinion, for the reasons explained above, the deliberations as such are not a legal principle on their own.

At least from the Swiss perspective, we rather have to examine whether the requirement for deliberations follows from one of the fundamental legal principles, which the Swiss Federal Tribunal considers as being part of (procedural) public policy. In this respect, I suggest that one of the possible anchors may be found in the specific legal relationship that exists between the arbitrators and the parties once the arbitral tribunal has been duly constituted.

In Switzerland, most authors consider that this specific legal relationship rests on a contractual basis – a *receptum arbitri* – and is governed by the provisions on agency contracts.⁹ The essential obligations of an agent are his/her duty to perform the business entrusted to him/her in accordance with the instructions received from the principal and by applying due care, due diligence and by acting in good faith (see, e.g. Articles 397 and 398 of the Swiss Code of Obligations).

As discussed above, one of the reasons that parties select multi-member arbitral tribunals (and in particular three arbitrator tribunals composed by two party-appointed co-arbitrators) is to ensure that by means of the process of deliberations a careful consideration of all issues to be

⁹ Lalive, Poudret and Reymond (fn. 4), Art. 179 N 6; Girsberger and Voser (fn. 4), N 14. See also Rüede and Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht – nach Konkordat und IPRG*, 1993, p. 41.

determined will take place and – hopefully – a sensible and “fair” outcome of the case may be reached. From this perspective, it seems justified to consider that the deliberations are part of the arbitrators’ general requirement to act in good faith in the performance of their obligations.

As seen above, the principle of good faith is one of the fundamental principles that the Swiss Federal Tribunal accepts to be part of (international) public policy. Therefore, it seems to me that – in Switzerland – annulment or non-recognition of an arbitral award as a result of irregular, inadequate or no deliberations may be sought, if any, by invoking that the arbitrators have failed to comply with the fundamental principle of good faith and, as a result, have rendered an award that is incompatible with public policy.

Apart from that, I consider that the “rights and obligations of arbitrators in the deliberations” concern issues which are open to party autonomy, unless the applicable arbitration law at the arbitral seat provides otherwise. In other words, the parties and the arbitrators may in principle, by agreement, establish rules to govern those issues.

At the end of the day, however, the deliberations of an arbitral tribunal are largely driven by custom and by the way in which the arbitrators – by contractual intention – decide to establish and organise a framework for dealing with the issues to be determined in their actual case.

This is so because, as seen above, arbitration laws and arbitration rules normally fail to provide guidance on the principles governing the deliberations and, thus, there are no pre-existing provisions to which the parties (and arbitrators) are deemed to have agreed upon by implied consent. Further, it is just as rarely the case that the parties (and, to the extent necessary, the arbitrators) have concluded a specific “tailor-made” agreement dealing with issues concerning the deliberations.

Therefore, the main purpose of the following is to establish how the arbitral tribunal may want to address specific problems of the deliberations when there is no pre-existing rule and no subsequent agreement can be reached.

3. Determining the process and timing of the deliberations

Once the taking of evidence has been declared closed and oral arguments and/or post-hearing submissions have been delivered, a multi-member arbitral tribunal is required to determine the process and timing of its deliberations. In my view, this is an *obligation* but also a *right* of the arbitrators.

As discussed above, most arbitration laws and arbitration rules are silent on this matter. Organising the process and timing of the deliberations thus remains a matter for the discretion of the arbitrators.¹⁰ The arbitral tribunal may deliberate at any location it considers appropriate – indeed, this is one of the few principles that arbitration rules occasionally address (see, e.g. Article 18(2) of the UNCITRAL Arbitration Rules); it may instead hold telephone or video conferences, or may limit the deliberations to a written procedure, e.g. on the basis of a list of issues to be determined or a draft of the award which is normally prepared by the presiding arbitrator.¹¹

The length of the deliberations depends on a wide variety of factors such as the complexity of the case, the number of claims and issues to be decided, the diaries of the arbitrators, the degree of collegial cooperation between the arbitrators and so forth.¹²

One of the driving factors may also be whether the award has to be made by unanimity, by majority or even – if there is no majority – by the presiding arbitrator alone.¹³ A multi-member tribunal normally seeks to reach a unanimous award which in fact may often be achieved.¹⁴ In deliberations where there is a substantial amount of what looks like “bargaining”,¹⁵ however, different strategies may (or have to) be adopted depending on whether the tribunal is required to reach a unanimous result or the chairperson has the last word without regard to what the co-arbitrators may have to say.¹⁶

¹⁰ Rüede and Hadenfeldt (fn. 9), p. 294; Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 1989, N 678; Wirth, *Basler Kommentar*, 2006, Art. 189 IPRG N 11. For example, the Swiss Federal Tribunal held that the arbitrators may agree – expressly or by conduct – that the deliberations take place “par voie de circulation”, i.e. by exchange of correspondence (BGE 111 Ia 336 E. 3a; BGer 4P.115/2003 of 16 October 2003 E. 3.2).

¹¹ Derains and Schwartz (fn. 7), pp. 221-222; Fouchard, Gaillard and Goldman (fn. 4), N 1372; Girsberger and Voser (fn. 4), N 979, N 995; Kaufmann-Kohler and Rigozzi (fn. 8), N 675; Poudret and Besson (fn. 4), N 734. For example, the Austrian Oberster Gerichtshof held that there is no non-recognition of an award on the grounds that the arbitrators did not meet in person to deliberate, but that the tribunal may deliberate by other means of communication (Judgment of 26 April 2006, XXXII Y.B.C.A. 2007, p. 259).

¹² Born (fn. 4), Vol. II, p. 1869.

¹³ On the latter option, see: Reymond, *The President of the Arbitral Tribunal*, ICSID Rev.-For. Inv. L.J. 1994, p. 8.

¹⁴ Born (fn. 4), Vol. II, p. 1870; Derains and Schwartz (fn. 7), p. 307.

¹⁵ In complex cases with a variety of claims (and counterclaims) to be decided, unanimous awards are indeed quite frequently the result of mutual concessions; see, e.g. Bredin (fn. 5), p. 49.

¹⁶ For a case in which the award has to be rendered by a majority, a rather anecdotal strategy is reported by *Nat'l Bulk Carriers, Inc. v. Princess Mgt Co.*, 597 F.2d 819, 822 (2d Cir. 1979) where the Court refused to vacate the award on the argument that the chairman had acted improperly by stating “he would sign an award with whichever of his colleagues would first agree to a number between \$1.5 million and \$2.0 million”.

4. Participation in the deliberations

Effective participation in the deliberations is certainly a *right* of each of the arbitrators.¹⁷ It may thus be claimed that the process of deliberations was faulty if two arbitrators have mobbed (like unsuccessfully claimed in the famous CME case¹⁸) or otherwise excluded their fellow arbitrator from an equal and reasonable participation in the decision-making process.¹⁹

However, actual participation in the deliberations must also be seen as an *obligation* of the arbitrators.²⁰ Article 382 of the Swiss Code of Civil Procedure, which applies to Swiss domestic arbitration proceedings, perfectly illustrates this by stating as follows:

“(1) All arbitrators shall participate in the deliberations and votes.”

“(2) If an arbitrator refuses to participate in a deliberation or vote, the other arbitrators may deliberate and decide in the absence of such arbitrator, unless the parties have agreed otherwise.”

In my view, these principles, although not expressly mentioned in Article 189 of the Private International Law Act, shall apply *mutatis mutandis* to Swiss international arbitration cases.

Consequently, when an arbitrator – usually a party-appointed one – refuses to participate in the deliberations and votes without valid reasons,²¹ the remaining members of the panel may proceed with the making of the award in the absence of the reluctant member, unless the parties have agreed otherwise.²²

¹⁷ Le Boulanger (fn. 7), p. 263; Reymond (fn. 13), pp. 12, 14; Poudret and Besson (fn. 4), N 735; Girsberger, Basler Kommentar, 2010, Art. 382 ZPO N 21.

¹⁸ Czech Republic v. CME Czech Republic BV, Judgment of 15 May 2003, Case No. T 8735-01 (Svea Court of Appeal).

¹⁹ See, e.g. Goeller v. Liberty Mut. Ins. Co., 568 A.2d 176 (Pa. 1990) where the Court annulled the award because two arbitrators had excluded their fellow arbitrator from the deliberations.

²⁰ Born (fn. 4), Vol. I, p. 1622; Berger and Kellerhals (fn. 4), N 1351; Lalive, Poudret and Reymond (fn. 4), Art. 189 N 5; Poudret and Besson (fn. 4), N 735; Rüede and Hadenfeldt (fn. 9), pp. 212, 294; Wirth, Basler Kommentar, 2006, Art. 189 IPRG N 10.

²¹ See on this and other dilatory tactics of arbitrators, Gaillard, Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international, Rev. arb. 1990, pp. 780 ss.

²² Berger and Kellerhals (fn. 4), N 1351. On the problem of “truncated” tribunals see, among many others, the specific studies of: Donahey, The UNCITRAL Arbitration Rules and the Truncated Tribunal, Am. Rev. Int. Arb. 1993, pp. 191-197; Schwebel, The Authority of a Truncated Tribunal, ICCA Congress series Vol. 9, Paris 1999, pp. 314-318; Seifi, The Legality of Truncated Arbitral Tribunals (Public and Private): An Overview in the Wake of the 1998 ICC Rules of Arbitration, Jnl. Int. Arb. 2000, pp. 3-46; Solhchi, The Validity of Truncated Tribunal Proceedings and Awards, Arb. Int. 1993, pp. 303-316.

Hence, the requirement that all arbitrators shall take part in the deliberations and votes is sufficiently observed if each arbitrator had the *opportunity* to do so.²³ It is enough if the remaining active arbitrators keep the missing arbitrator informed of all significant stages in the making of the award and thereby offer him/her the opportunity to express him-/herself and take part in the decision-making at any time.²⁴

5. Duties of care, diligence and expedition

The duties of care and diligence include devoting the necessary time and attention to the issues to be determined and analysing the submissions and evidence with the necessary skills and ability.²⁵ The counterpart of these obligations is to decline the acceptance of cases for which the arbitrator in question may be ill-suited – for example, because of insufficient knowledge of the applicable law or lack of language skills – or may not have the necessary time available.²⁶

Furthermore, the arbitrators are generally expected to conduct the arbitration – and in particular also the deliberations – with expedition.²⁷ This matter is sometimes addressed specifically in arbitration laws or arbitration rules which set periods of time for rendering the award (like, for example, Article 30(1) of the ICC Rules or Article 42(1) of the Swiss Rules for the Expedited Procedure) or even particularly agreed by the parties in the arbitration agreement or some subsequent arrangement providing for fast-

²³ Fouchard, Gaillard and Goldman (fn. 4), N 1373; Girsberger and Voser (fn. 4), N 987; Kaufmann-Kohler and Rigozzi (fn. 8), N 675; Wirth, Basler Kommentar, 2006, Art. 189 IPRG N 13.

²⁴ Thus, in the CME case the Svea Court of Appeal held that when a decision by a majority is required and two arbitrators agree on the outcome of the case, the third arbitrator “cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others as to the correctness of his opinion”. He is thus “not afforded any opportunity to delay the writing of the award” (Czech Republic v. CME Czech Republic BV, Judgment of 15 May 2003, Case No. T 8735-01). For *Switzerland* see BGE 128 III 234 in which the Swiss Federal Tribunal took a similar approach by upholding the award where a party-appointed arbitrator did not formally withdraw from his office, but only refused to cooperate or obstructed the proceedings, in particular by refusing to participate in the deliberations of the arbitral tribunal without valid reasons. But also see BGE 117 Ia 166 in which the Swiss Federal Tribunal vacated the award because it was rendered by the two remaining arbitrators after one of the co-arbitrators had resigned. For *France* see, e.g. Cour de cassation, Judgment of 28 January 1981, Rev. arb. 1982, p. 485: the party’s right to a fair hearing of its case is satisfied where the missing arbitrator was given the opportunity to make comments on the proposed amendments to the initial draft of the award; Paris Cour d’appel, Judgment of 1 July 1997, XXIV Y.B.C.A. 1999, pp. 281, 286: no non-recognition of an award rendered after one of the arbitrators had resigned from the tribunal.

²⁵ Fouchard, Gaillard and Goldman (fn. 4), N 1130; Born (fn. 4), Vol. I, p. 1621.

²⁶ Born (fn. 4), Vol. I, p. 1621.

²⁷ Redfern and Hunter, *International Arbitration*, 2009, N 5.65; Born (fn. 4), Vol. I, pp. 1623-1624.

track arbitration.²⁸ Sometimes time-limits are imposed by the institution that administers the case.²⁹

The important question, however, is: what remedies are available if the arbitrators – or some of them – fail to comply with these duties?³⁰

As discussed above, it is inconceivable that there be a right (of the parties or the other arbitrators) to specific performance against the defaulting arbitrator.

Instead, the only way out of the problem is to have an arbitrator who fails to comply with the duties of care, diligence and expedition replaced. This remedy is generally available under both the applicable arbitration law and, if so agreed, the arbitration rules that govern the proceedings. In my view, the right to apply for the replacement of an arbitrator should be available not only to the parties but also to the other members of the panel.

Be that as it may, it is conspicuous that the remedy of replacement of an arbitrator for having failed to properly fulfil his/her functions is very rarely used. I submit that this is not the case because all arbitrators just simply always proceed with their duties by applying the utmost care and diligence. Instead, I guess that replacements are so rare because, in practice, they may be very time-consuming and burdensome for both the parties and the remaining arbitrators and, therefore, are often not in the best interest of the case. Thus, when there is an arbitrator on the panel who fails to comply with his/her duties, it is still often more convenient and reasonable for the parties and the other arbitrators to take the burden of dragging this arbitrator along with them rather than going through the process of replacement.

6. Impartiality and independence

The principle that arbitrators have to be and remain impartial and independent throughout the entire proceedings has become an inherent feature of modern international arbitration.³¹ Absence of independence or impartiality entails that the arbitrator in question may be challenged and, in

²⁸ Fouchard, Gaillard and Goldman (fn. 4), N 1385; Girsberger and Voser (fn. 4), N 988-989.

²⁹ The ICC's standard letters to the tribunals newly include the following sentence: "The Court expects Arbitral Tribunals to submit draft awards for scrutiny within three months after the last hearing concerning matters to be decided in such award or the filing of the last authorised submission concerning such matters, whichever is later."

³⁰ See on this question the specific study by Okekeifere, *The Parties' Rights Against a Dilatory or Unskilled Arbitrator*, *Jnl. Int. Arb.* 1998, pp. 129-144.

³¹ Redfern and Hunter (fn. 27), N 1.91, 4.72; Fouchard, Gaillard and Goldman (fn. 4), N 1129.

the event, replaced by the competent authority, be it the courts at the arbitral seat (in ad hoc arbitration) or the agreed arbitral institution.

Yet there still are arbitrators for whom, for whatever reason, it is unthinkable that they can decide the case in whole or in part against the party that had designated or appointed them. An attitude or mindset of this kind, which obviously gives rise to justifiable doubts as to that arbitrator's impartiality or independence, may often transpire only towards the end of the proceedings, in particular in the course of the deliberations.³²

How should the tribunal, in particular the presiding arbitrator, deal with this?

For the same reasons as discussed above, a request for the replacement of the biased arbitrator will normally not be the most sensible solution. Having regard to the tried and tested maxim "*gouverner c'est prévoir*" the presiding arbitrator will try to identify such a "candidate" well in advance and think about how he/she could be kept at it as long and as effectively as possible.³³

The deliberations and the decision-making process of an arbitral tribunal often advance in an informal way. However, if there is a risk that one of the arbitrators is likely to make "real" difficulties, then it is important for the presiding arbitrator to properly record each step of the deliberations and decision-making process in the arbitral tribunal's internal file.³⁴ In particular, he/she should then give the co-arbitrators adequate advance notice of the date, time and place of any meetings or telephone conferences, make summary notes of those discussions and circulate them to his/her fellow arbitrators, properly announce when (and where) the panel shall vote on the dispositive part of the award, duly record the outcome of such voting and so forth.

All these safety measures may prove to be very helpful in case of a subsequent challenge against the award on the grounds of any alleged irregularity in the decision-making process.

7. Duty to apply the law

Considering that the arbitral tribunal, by virtue of its functions under the applicable arbitration law and the provisions of the New York

³² Leboulanger (fn. 7), pp. 259-260.

³³ See more generally on this recommendation in order to prevent "pathological deliberations", Derains (fn. 5), p. 222. On the relationship between the president and the arbitrators in these situations, see: Reymond (fn. 13), pp. 10-11.

³⁴ See on this issue also Karrer, Backstage in Arbitral Tribunals – Think ahead and go fast, Croatian Arbitration Yearbook, Vol. 20 (will be published in December 2013).

Convention, is empowered to decide the dispute between the parties in a legally binding and enforceable manner, the arbitrators have a duty to decide the case in accordance with the applicable law (or rules of law).

In other words, sitting on an arbitral tribunal is not a “free ticket” to limit the view to the terms of the contract or trade usages, principles of *lex mercatoria* and the like, let alone to decide the case *ex aequo et bono* or as *amiable compositeurs* (save where so agreed by the parties), but to apply the law, including any mandatory provisions of the applicable law.³⁵ This obligation particularly unfolds in the course of the deliberations.

Here we once again face the problem of remedies. In many jurisdictions – like for example in Switzerland – there is no meaningful remedy. A failure by the arbitral tribunal to apply the law (or rules of law) governing the merits of the case does not fall within the narrow definition of an incompatibility with public policy.³⁶

Nonetheless, the duty of the arbitrator to (properly) apply the law is at the core of his/her mission. Any misuse of the “freedom” which the arbitral tribunal enjoys as a result of the parties’ impossibility to have an award vacated on the grounds of a wrong application of the law seriously compromises arbitration as a whole.³⁷

It is therefore not surprising that – as a result of the tremendous increase of cases over the last 10 to 15 years – voices are on the rise pleading for a loosening of the rigid system which, today, practically excludes that even a limited review of the merits by the courts at the arbitral seat takes place.³⁸

8. Obligation of performance in person (no delegation)

The qualification of the arbitrator’s mission as a mandate or agency contract entails that he/she may in principle not delegate his/her tasks and responsibilities to third parties, nor to some of the tribunal members, for example to the presiding arbitrator.³⁹ After all, the arbitrator has been selected to perform his/her function because of his/her personal skills, qualifications, experience, reputation etc.

Consequently, the arbitrator cannot delegate his/her duties to attend the deliberations and participate in the decision-making (voting) – just as little as

³⁵ Born (fn. 4), Vol. I, p. 1626.

³⁶ BGE 116 II 634 E. 4.

³⁷ Born (fn. 4), Vol. I, p. 1626.

³⁸ Lalive, L’Article 190 al. 2 LDIP a-t-il une utilité ? ASA Bull. 2010, p. 726.

³⁹ Reymond (fn. 13), p. 5.

he/she is allowed to delegate the other essential tasks of the tribunal in the course of the arbitration process, in particular organising the proceedings, assessing the parties' written submissions, attending hearings, taking evidence and so forth.⁴⁰

A violation of this obligation would give rise to annulment or non-recognition of the award on the grounds of irregular composition of the arbitral tribunal.⁴¹

9. Assistance to the tribunal

Despite the prohibition to delegate as discussed above, it is common for arbitrators to seek assistance in the course of the proceedings from various sources. The best known and perhaps most debated of these third parties is the secretary to the tribunal.⁴²

Assuming the arbitration law (like Article 365 of the Swiss Code of Civil Procedure) or the arbitration rules (like Article 15(5) of the Swiss Rules) or a specific agreement by the parties allows the appointment of a secretary or other third parties to assist the tribunal, one of the major questions is whether these assistants may attend the deliberations.

In my view, the preferred solution in this regard is accurately described by Rule 15 of the ICSID Arbitration Rules:

“(1) The deliberations of the Tribunal shall take place in private and remain secret.”

“(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.”

In other words, the arbitral tribunal shall have full control over the question. Other persons (including a secretary) should only be allowed to attend the deliberations if all members of the arbitral tribunal consent to such participation. There should be a requirement for the tribunal to consult with the parties before allowing other persons than the arbitrators to attend, but the tribunal should keep the last word on this.

If other persons than the arbitrators attend the deliberations – even when this happens without the consent of the parties – it is difficult to

⁴⁰ Berger and Kellerhals (fn. 4), N 1031, N 1197.

⁴¹ Born (fn. 4), Vol. I, p. 1629.

⁴² Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, *Arb. Int.* 2002, pp. 147-163; Mestre (fn. 5), p. 787. From the Swiss perspective, also see: Kaufmann-Kohler and Rigozzi (fn. 8), N 678; Rüede and Hadenfeldt (fn. 9), p. 194; Berger and Kellerhals (fn. 2), N 918-923.

imagine that this might give rise to a successful challenge of the award. The challenging party would have to demonstrate that the said third party, for example a secretary, has had a material influence on the outcome of the case. An incident of this kind, however, is difficult to imagine, at least where the arbitrators have fully discharged their duties, which includes that any work prepared by a non-member has been carefully reviewed and only been used or relied on with caution.

10. Confidentiality of the deliberations

As discussed above, the confidentiality of the deliberations is considered as an inherent feature of international arbitration,⁴³ as evidenced, for example, by Article 9 of the IBA Rules of Ethics for International Arbitrators:

“The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of giving any assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.”

Confidentiality of the deliberations means on one hand that the deliberations have to take place *in camera*. As mentioned, only members of the tribunal and other persons admitted by the tribunal may attend. On the other hand, it entails that each arbitrator has an obligation and is bound to keep the development of the deliberations and the results of voting confidential, both from the parties and any uninvolved third parties.⁴⁴

According to the Swiss Federal Tribunal, the obligation to keep the deliberations confidential relates to “all opinions expressed in the course of the discussion, that is, ultimately, the way in which the majority was achieved.”⁴⁵

Thus, an arbitrator shall not provide the parties with any information on the course of the deliberations and votes.⁴⁶ Such information may consist of the contents of oral discussions between the members of the panel and of

⁴³ See the references in fn. 4 above.

⁴⁴ Berger and Kellerhals (fn. 4), N 908; Girsberger, Basler Kommentar, 2010, Art. 382 ZPO N 13.

⁴⁵ BGer 4P.61/1991 of 12 November 1991 E. 1b/bb.

⁴⁶ Fouchard, Gaillard and Goldman (fn. 4), N 1374.

written documents such as drafts of the award, memoranda, working papers, exchanges of letters, faxes or emails between the arbitrators, etc.⁴⁷

Who holds the right to the confidentiality of the deliberations?

Some may say it is the parties.⁴⁸ The majority in legal writing, however, seems to support the view that the confidentiality of the deliberations and votes serves to protect the arbitrators.⁴⁹

But from what exactly shall it protect the arbitrators? What is so specific that arbitrators must be protected from it, while state court judges do not need such protection? After all, we should not forget that, at least in Switzerland, civil procedure commands that, in many courts, the deliberations in civil and commercial matters are public (cf. Article 54(2) of the Swiss Code of Civil Procedure).

Having said this, neither of the two theories really is convincing. In my view, the main purpose of the confidentiality of the deliberations in international arbitration is to ensure that the parties do not find out or hear about the result of the award before its notification.

Why is that important? Because, depending on the complexity of the case and other factors, it can take a long time from the date on which the tribunal closes the deliberations by voting on the dispositive part and the date on which the final “product” in the form of the written award with the reasons on which it is based can be notified to the parties.

If, as a result of “open” deliberations and votes, a party knew well in advance of the award’s notification that it is going to lose, it may be tempted to commence taking adverse measures, which may include filing challenges against the arbitrators or stripping off assets to prevent future enforcement. Likewise, if a party knew well in advance that it will win the case it would be tempted to take advantage of that fact, for instance by trying to seize assets in the country of enforcement.⁵⁰

For these reasons, the arbitrators – especially the party-appointed ones – shall ensure and thus are obliged that throughout the proceedings but especially during the deliberations no information on the discussions between

⁴⁷ Berger and Kellerhals (fn. 4), N 1345.

⁴⁸ Born (fn. 4), Vol. I, p. 1663.

⁴⁹ Fouchard, Gaillard and Goldman (fn. 4), N 1167; Girsberger and Voser (fn. 4), N 981; Wirth, Basler Kommentar, 2006, Art. 189 IPRG N 27.

⁵⁰ See on these problems from a similar perspective, Karrer, Backstage in Arbitral Tribunals – Think ahead and go fast, Croatian Arbitration Yearbook, Vol. 20 (will be published in December 2013).

the tribunal members leaks to the parties, neither as a result of negligence nor – *a fortiori* – as a result of intentional misconduct in the form of *ex parte* contacts with one of the parties (normally the one who appointed them). Otherwise, the examples just mentioned demonstrate that equal treatment of the parties⁵¹ is made a mockery of if one party (but not the other) knows well in advance of the outcome of the case.

A breach of the duty to keep the deliberations confidential may give rise to a claim for damages against the arbitrator who failed to comply with it.⁵²

However, it is difficult to imagine that the award as such may be affected by an unlawful disclosure of confidential information stemming from the deliberations. The mere fact of a breach of confidentiality does not therefore give rise to annulment or non-recognition of the award.

11. Dissenting opinions

The concept of “dissenting opinion” – understood to mean that a minority arbitrator makes available to the parties his/her own assessment of the case – is in obvious contrast to the principle of confidentiality of the deliberations.

Despite this, dissenting opinions seem to have gradually become accepted instruments in international arbitration.⁵³ In other words, the confidentiality of the deliberations is not an ultimate “barrier” for an arbitrator who is not in agreement with the majority to draft a dissenting opinion for the parties.

Some authors consider that there is a “fundamental right” to disclose dissenting opinions under any circumstances.⁵⁴ By contrast, the Swiss Federal Tribunal considers that where the parties have not expressly excluded the notification of a dissenting opinion, it is a matter for the tribunal or the

⁵¹ See on this aspect of a violation of the confidentiality of the deliberations, Derains (fn. 5), pp. 225-226.

⁵² Berger and Kellerhals (fn. 4), N 909, N 1350, N 1350; Fouchard, Gaillard and Goldman (fn. 4), N 1374; Girsberger, Basler Kommentar, 2010, Art. 382 ZPO N 17.

⁵³ As to whether dissents are for the better or worse, see: Rees and Rohn, Dissenting Opinions: Can they Fulfil a Beneficial Role? Arb. Int. 2009, pp. 329-346.

⁵⁴ See, e.g. Blessing, Das neue internationale Schiedsgerichtsrecht der Schweiz – Ein Fortschritt oder ein Rückschritt?, in: Die internationale Schiedsgerichtsbarkeit in der Schweiz, 1989, p. 74. In similar terms, Lévy, Dissenting Opinions in International Arbitration in Switzerland, Arb. Int. 1989, pp. 41-42.

majority of its members to decide whether, and in what form, a dissent should be made available to the parties.⁵⁵

In my view, the latter approach is preferable. To accept that dissenting opinions may be disclosed under any circumstances would mean to deny quite bluntly the principle of confidentiality of the deliberations.

I accept, however, that there may be exceptional circumstances in which a minority arbitrator should be allowed to make available his/her dissent to the parties even without the consent of the majority. Such a situation may exist, for example, where the dissenting arbitrator, acting in good faith, considers it his/her duty to disclose “any material misconduct or fraud on the part of his fellow arbitrators” (Article 9 of the IBA Rules of Ethics) or to inform the parties of any serious procedural errors, which in his/her opinion have occurred during the deliberations, and which would otherwise have remained undiscovered.⁵⁶

As a matter of Swiss arbitration law, the legal effects of a dissenting opinion are limited. The Swiss Federal Tribunal held that a dissenting opinion is separate from the award and therefore does not affect either the reasons on which it is based or the dispositive part. Any defects of procedure that might have occurred in relation to the drafting or communication of the dissenting opinion thus have no effect on the award itself.⁵⁷

If an arbitrator exceeds his/her (limited) right to issue a dissenting opinion, for example makes it available to the parties without having informed his/her fellow arbitrators and obtained their approval, he/she in principle commits a breach of his/her duties arising from the *receptum arbitri*. Under Swiss law, however, as a result of the clear-cut case law of the Federal Tribunal, the consequences of such breach are limited or non-existing. What remains, in my view, is a serious breach of the principle of collegiality vis-à-vis the other arbitrators.⁵⁸

⁵⁵ BGer 4P.23/1991 of 25 May 1992 E. 2b.

⁵⁶ Berger and Kellerhals (fn. 4), N 1369.

⁵⁷ BGer 4P.23/1991 of 25 May 1992 E. 2b.

⁵⁸ On particular aspects of dealing with dissents, see: Arroyo, Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal, ASA Bull. 2008, pp. 437-466.

Bernhard BERGER, *Rights and Obligations of Arbitrators in the Deliberations*

Summary

The ASA Swiss Arbitration Association's Annual Conference of 1 February 2013 in Zurich was devoted to the topic: "Inside the Black Box – How Arbitral Tribunals Operate and Reach their Decisions". This article derives from an introductory presentation that the author held at the said Conference. It analyses the legal framework of the deliberations. The author identifies and discusses a number of rights and duties of arbitrators that specifically arise at the stage of the deliberations, such as determining the process and timing of the deliberations, the right (and obligation) to participate in the deliberations, the (limited) right of the tribunal to seek assistance from other persons, and the (restricted) right to disclose a dissenting opinion. Moreover, the article analyses some of the general duties of arbitrators in the particular context of the deliberations, such as the duty of confidentiality, the duties of care, diligence and expedition, the obligation to apply the law, and the duties to be and remain impartial and independent.

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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